Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN MCLAUGHLIN; CHARLES A. MICEWSKI; DENNIS J. MCKEEFERY; EDWARD EGGLES
Petitioner

v.

ALEX WATSON, Assistant Secretary of State for the U.S. State Department; DAVE LAWRENCE; LARRY LEIGHTLEY; VICTORIA NAYLOR; MICHAEL STILES; DETECTIVE SILVANA; DETECTIVE WOODS; ARNOLD GORDON; TOM CORBETT; JOHN KELLY; MICHAEL B. FISHER; RICHARD PATTON; LOU GENTILE; FIQUITO VASQUEZ; PENA-GOME2; PEDRO CORPORAN
Michael Stiles,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.) Is a federal prosecutor entitled to qualified immunity when he intentionally uses his influence to obtain adverse personnel actions against state law enforcement agents while he is acting in an administrative capacity?

2.) Did the Third Circuit violate the established law of this Court and disregard their own prior holdings to provide federal official Stiles with qualified immunity?

PARTIES TO THE PROCEEDINGS

PETITIONERS

Petitioner McLaughlin, Micewski, McKeefery, and Eggles are Pennsylvania state narcotics agents who work for the Attorney General of Pennsylvania..

RESPONDENT

Respondent Michael Stiles, at the times complained of below, was the United States Attorney for the Eastern District of Pennsylvania.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, which is appealed from here, was filed on November 20, 2001 (Appendix "A"). The relevant opinion of the United States Court for the Middle District of Pennsylvania was filed on January 6, 2000. An also relevant earlier opinion, of the United States Court of Appeals for the Third Circuit (Appendix "C") was filed on September 21,1999.

JURISDICTION

The Third Circuit Opinion was filed on November 20, 2001 (Appendix "A"). The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS INVOLVED

1.) The First Amendment to the United States Constitution provides in relevant part; "Congress shall make no law. -abridging the freedom of speech...or the right of the people peaceably to assemble..."

2.) The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall...be deprived of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

The petitioners are 4 state narcotics agents who were among the most productive in Pennsylvania history. They learned, while working the Black and Hispanic sections of Philadelphia (with help from DEA, Customs and FBI personnel) that a prolific flow of heroin and cocaine was coming into the U.S. from the Dominican Republic and that cash was being returned for use in the presidential election efforts of Pena's Gomez and a Dominican Political Party, the PRD. The PRD, and Gomez, were backed by the U.S. Slate Department, something, to their ultimate disadvantage, the agents stumbled upon. After attempting to serve papers on PRD operatives, including Gomez, (something that was thwarted by the U.S. State Department) who came to New York for a fund-raising event, the agents found themselves to be subject to an organized media attack that seemed to eminate from certain attorneys for the Dominicans, the Philadelphia District Attorney's Office, and the U.S. Attorneys Office- They were smeared in the press, the allegations being that the agents regularly violated the civil rights of citizens while doing searches and seizures. Meanwhile, the Philadelphia District attorney, and Mr. Stiles, on behalf of the U.S. Attorney's Office, dropped numerous cases against the Dominicans, barred petitioners from bringing cases, and Mr. Stiles even launched a purported grand jury investigation. The petitioners were transferred from their positions in Philadelphia, except McKeefery, who was put in charge of auto details. McLaughlin was sent to Western Pennsylvania. Micewski was sent to Scranton. Their families suffered as they did. They were taken out of all investigative work. Their career's were destroyed.

The state Attorney General launched a separate investigation utilizing one of their top lawyers and independent investigators who actually went into the streets of Philadelphia.

The attorney, one of Pennsylvania's finest, Eric Noonan Esq, exonerated the petitioners. This information was shared with the Philadelphia DA and Mr. Stiles. While this was occurring, the grand jury investigation, which was simply a non-investigation, if it could be termed an investigation at all, after doing nothing, concluded that no one would be indicted, was effectively dropped. That decision was made by Mr. Stiles in the Spring of 1998, and it was communicated to the state defendants below right away. Yet the abandonment of the investigation into the petitioners alleged misconduct was not announced publically and not learned of by petitioners until February of the following year. However, in August of 1998, Mr. Stiles, for absolutely no investigative or prosecutorial purpose, pressed the state defendants to keep the petitioners out of Philadelphia, that caused, in part, serious personal injury to the petitioners. These actions by Stiles were not investigatory or prosecutorial in nature at all, and as such were not privileged in anyway. The District Court, in an Opinion by the Honorable Albert Caputo, that reflected a dutiful and prodigious effort at reading and understanding the record, and also in adhering to the September 21, 1999 opinion of the U.S. Court of Appeals (Appendix "C"), ruled that Mr. Stiles motion for Summary Judgment be denied, or at least be denied at that point. One small excerpt from Mr. Noonan's report on his investigation is worth reproduction here:

> "During slightly more than an hour of driving through the various neighborhoods, our vehicle was approached no fewer than three times by street comer dealers who readily displayed

various types of drugs to the driver. In addition to that, specific drug transactions involving the displaying of the drugs were readily observed by us on more than five occasions. On these occasions the packets/vials which contained the contraband were visible. It is noteworthy that on the date this tour was undertaken the Philadelphia Police Department's "Weed and Seed" van and complimentary heightened police presence was taking place. Obviously, it had very tittle impact on these street dealers' temerity. Although an assessment of the credibility of the agents' statements in this regard is subjective, based upon the foregoing, we cannot state that their statements are incredible. To the contrary, based upon the foregoing, it appears that their recurring ability for such plain view observations is quite believable. A general concern raised by the District Attorneys Office had to do with recurring fact patterns. While they conceded they were not in a position to say that they were the result of fabrication on the part of BNI, they questioned the believability of the fact patterns in question realistically occurring with such frequency. With the exception of the interdiction cases, however, our review revealed no discernable fact patterns that were incredible due to their frequency."

This was the kind of information available to Judge Caputo. Yet, without any review of the detailed fact record available to him, the Third Circuit substituted its judgment for Judge Caputo's, and without any real knowledge of the facts, treats

the underlying case as less than well founded. The entire basis, sans politics, that lay behind the false and injurious accusations against the petitioners which totally immasculated their careers, and also injures them personally in other ways, were these so called fact patterns advanced by Dominican drug dealer lawyers who served at the Da's office with Stiles. Petitioners allege it was a pre-texual argument. Stiles knew the petitioners had committed no wrongs by the Spring of 98 , he continued to influence the attorney general of Pennsylvania to injure the petitioners, even offering to come to the federal court and testify against them. Why? In his own deposition he admitted he had no specific knoweldge of the agents doing any wrong. He was only going to testify that they weren't welcome in his district. Incidentally, they (the U.S. Attorneys' Office) continued to use petitioners for witnesses in federal cases, and they continue to today. If they are not reliable as affiants and investigators, how could they be reliable as witnesses?

Shortly before argument on the case below the U.S attorney notified the Third Circuit of a case which had in fact been written by a member of the panel which decided this case sub judice, namely Baldassare v. New Jersey, .250 F.3d 188 (3d Cir 2001), and, consistant with F.R.A.P. 28 (j) notified the Court that the opinion therein could be adverse to Mr. Stiles request for a qualified immunity ruling. This is because Mr. Stiles claims for immunity was based upon his argument that the agents rights weren't clearly established (something Baldassare traced to 1982) at the time he allegedly injured them. In the interim petitioners counsel had also discovered the recently reported case and attempted to raise it during oral argument but was denied because it "was not raised in the appellees' (petitioners) brief. "Ultimately, based upon the reasoning that Stiles had only raised "absolute" not "qualified" immunity previously in the litigation, the Third Circuit

panel, though made aware of it by both parties, totally avoided even a mention of Baldassare. This is not a supportable argument. The facts presented were such that the earlier Third Circuit Opinion(Appendix "C") it was not only dispositive of prosecutorial, but also qualified immunity. The matter was addressed indirectly by the Third Circuit (Appendix "C") where it put Stiles in with the state "?PAG Defendants"). By so doing, the previous Third Circuit panel could hardly have been ignorant of, nor unmindful of, any qualified immunity implications, most notable of which is that "Administrative decisions" are not subject to qualified immunity, any more than they are to prosecutorial immunity, where there is a clearly established right Constitutional (Baldassare). Additionally there simply were no factual grounds asserted by the respondents to support Stiles contention that the petitioner's rights weren't clearly established ie. he didn't know that injuring someone for complaining of their fate, or for speaking out on a matter of public concern (petitioners were refused the right to speak out publically in their own deference - and McLaughlin insisted on going to Washington to complaint Baldassare was plainly dispositive of this issue. Thus the Third Circuit overturned and misapplied the functional analysis test for qualified immunity for prosecutors (something this panel has done previously) laid down by this Court in Imbler and it progeny, placing the Third Circuit in conflict with its own prior ruling on two cases, and with the law of this Court on many.

REASONS FOR GRANTING THE WRIT

The Third Circuit avoided the application of well established law laid down by this Court in Imbler v. Pachtman, , Burns v. Reed, and Buckley v. Fitzsimmons. The proper approach any court should take in ascertaining the applicability of immunity

for prosecutors is to apply a functional analysis. In the original Third Circuit case at No. 99-3087 the panel found, sua sponte. that an administrative claim had been alleged against Mr. Stiles. Mr. Stiles' position was that he was entitled to absolute immunity. In making that argument Stiles erroneously claimed that he was performing prosecutorial functions, and he attempted to characterize petitioners' claim, factually, as based upon Stiles refusal to prosecute the agents' drug cases. This was never an asserted basis for the agents' claims who knew they had no such right. The agents did know (at the time) that the grand jury probe was a facade. Stiles knew this in the Spring of 98 but didn't report it til later. They also learned that Noonan's report had been shared with Stiles much earlier, thus, although apparently not articulated well initially, the Third Circuit nonetheless saw the "administrative" claim against Stiles in September 1999, thereby finding that he was, by definition, not entitled to prosecutorial immunity and thus obviously he would not be entitled to qualified immunity either on the facts presented below.

The Third circuit panel in 2001 treats this matter as if the earlier panel didn't address the qualified immunity issue because it wasn't squarely before them, thus providing an opening. This reasoning is legally disingenuous because, as Baldassare clearly said, such public employees had such rights as early as 1982. Ironically the second panel (2001) doesn't address the"clearly established" issue which just isn't there. Over a year later, after it became evident that Stiles had known in the Spring of 98 that the grand jury was going no where, and would indict no one, and after Stiles had been sued and was already a defendant, he pressured the state attorney general, against objections (August 1998), to get, and keep, the petitioners out of Philadelphia. Only 6 months later, under pressure from the press, did Mr. Stiles announce the failure of the grand jury to find petitioners at fault

for anything -something he knew almost a year before. In the Spring of 2001 (May) the Third Circuit decided Baldassare which recognized a long standing 1st Amendment right to be free of retaliation and administrative retribution for reporting wrong doing, there being no evidence whatsoever that the agents committed any wrong, and the plain inference being that the agents, including McLaughlin who journeyed to Washington to report to federal investigators were being punished for exercising their rights. Thus the Third Circuit decided against the established immunity for prosecutor standards laid down by this Court, against its own decision (by another panel) at No. 999-3087 (September 21,1999) McLaughlin el al v. Watson et al. (Appendix "C") and its own decision which was dispositive of Mr. Stiles position on ""clearly established constitutional rights", ie. Baldassarre. The Third Circuit has thus violated Rule 10(C) of this Court and should be reversed.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Filed November 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2377 and 01-1372

JOHN MCLAUGHLIN; CHARLES A. MICEWSKI; DENNIS J. MCKEEFERY; EDWARD EGGLES

v.

ALEX WATSON, Assistant Secretary of State for the U.S. State Department; DAVE LAWRENCE; LARRY LEIGHTLEY; VICTORIA NAYLOR; MICHAEL STILES; DETECTIVE SILVANA; DETECTIVE WOODS; ARNOLD GORDON; TOM CORBETT; JOHN KELLY; MICHAEL B. FISHER; RICHARD PATTON; LOU GENTILE; FIQUITO VASQUEZ; PENA-GOMEZ; PEDRO CORPORAN

Michael Stiles,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 97-CV-01555)
District Judge: Hon. A. Richard Caputo

Argued October 9, 2001

Before: SCIRICA, GREENBERG and COWEN, Circuit Judges

(Filed: November 20, 2001)

OPINION OF THE COURT

COWEN, Circuit Judge.

We are presented with the question of when a federal official is entitled to "qualified immunity" in a Bivens-based civil action for damages. Because we conclude that the District Court erred in denying Defendant the protection of qualified immunity, we will reverse.

This litigation centers around an investigation into drug trafficking activities in the Dominican Republic. Plaintiffs/Appellees are agents of the Pennsylvania Attorney General's Office who were involved in the drug investigation. In 1997, Plaintiffs filed a Bivens suit against Defendant/Appellant Michael Stiles ("Stiles"), then United States Attorney for the Eastern District of Pennsylvania. The Complaint alleged that Stiles violated Plaintiffs' first amendment rights and fifth amendment due process rights, and violated the provisions of 42 U.S.C. 1981. Plaintiffs also filed a civil rights action against members of the Pennsylvania Attorney General's Office ("PAG" Defendants), including Pennsylvania Attorney General Michael Fisher ("Fisher"), alleging violations of 42 U.S.C. 1981 and 1983. The original Complaint is long, prolix, and somewhat difficult to discern. However, the various causes of action were grounded in factual assertions that Defendants intentionally impeded Plaintiffs' criminal investigation and caused adverse employment conditions for Plaintiffs because Defendants wished to protect the Dominican drug organization. This appeal only involves the allegations

against Stiles. Stiles moved to dismiss the Complaint for non-compliance with Federal Rule of Civil Procedure 8. The Magistrate judge issued a Report and Recommendation that

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1. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971).

the Motion to Dismiss be granted. The District Court adopted the Magistrate's Recommendations and dismissed the case against Stiles, noting that Stiles was entitled to "absolute prosecutorial immunity." The case against the PAG Defendants was also dismissed because it failed to state viable claims and because the suit was barred by the 11th amendment to the United States Constitution.

In an unpublished opinion, a panel of this Court reversed. See McLaughlin v. Watson, No. 99-3087, (Sept. 21, 1999) ("McLaughlin I"). The Panel held that Plaintiffs were entitled to amend their Complaint to state a first amendment cause of action against the PAG defendants and an "administrative" cause of action against Stiles. Id. at 3-4. The Panel explained that while Plaintiffs' Complaint was "not a model of clarity," the Complaint suggested that Stiles used his influence as a United States Attorney to "obtain adverse personnel actions" against Plaintiffs. Id. at 3. The Panel further explained:

> As we made clear in Carter v. City of Philadelphia, [181 F.3d 339 (3d Cir. 1999)], prosecutorial immunity is restricted to prosecutorial--as distinguished from administrative--functions. Administrative decisions, including those regarding the employment or supervision of personnel outside the prosecutor's office, are not subject to absolute prosecutorial immunity. Because [U.S. Attorney] Stiles was not clearly entitled to prosecutorial immunity from all of the claims

against him, the analysis for whether the Agents state a cause of action against Stiles should proceed along the same lines as for the PAG Defendants. Id. at 4.

Pursuant to the Panel's suggestion in McLaughlin I, Plaintiffs amended their Complaint, which now included three counts.2 In Count I, Plaintiffs alleged that Defendants

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2. We note that the Amended Complaint is--like the initial Complaint--less than clear as to what precise constitutional violations are actually being alleged against Stiles. We will, however, interpret the allegations in the Amended Complaint's language giving every benefit to Plaintiffs. (both PAG and Stiles) impaired Plaintiffs' "terms and conditions" of employment via adverse "administrative" personnel action. According to Count I, Plaintiffs' rights were violated because Stiles and the PAG Defendants:

> [impaired] where [Plaintiffs] could work, how much ~~they were required to travel to the point of extreme~~ hardship causing serious and painful medical consequences, loss of promotional opportunities, and subsequent wages, shift differentials and overtime and career damaging evaluation reports.

App. at 234. According to the Amended Complaint, these actions breached Plaintiffs' "federally guaranteed rights to be free of irrational and injuries [sic] administrative actions for the proper performance of their duties. . . ."

Count II of the Amended Complaint alleged that Defendants deprived Plaintiffs of their right to"substantive due process" by subjecting them to unfair treatment in their public employment. Count II further alleged that Defendants acted against Plaintiffs

solely because of "their successful efforts to investigate [the Dominican] criminal wrongdoing." Id. at 235.Count III of the Amended Complaint alleged that Defendants violated Plaintiffs' first amendment rights by preventing Plaintiffs from responding to negative comments about Plaintiffs contained in certain press releases. According to the Amended Complaint: "the PAG defendants are still unlawfully enforcing today [their order to Plaintiffs] not to respond to the press in any form, or answer any charges in any forums." App. at 236.

Stiles moved to dismiss the Amended Complaint based on qualified immunity or, in the alternative, for summary judgment. The summary judgment part of the motion argued that there was no issue of fact as to whether Stiles acted administratively against Plaintiffs. In a Memorandum Opinion dated July 6, 2000, the District Court denied Stiles' Motion to Dismiss with the following language:

Defendant contends he is entitled to qualified immunity. I find it premature to determine this issue in defendant's favor. There is a first amendment claim asserted against defendant. That is a clearly established constitutional right, which, if interfered with by defendant's use of influence with plaintiffs' employer, would nullify the availability of qualified immunity. The Motion for Summary Judgment was denied because the District Court concluded that "there is a genuine issue of material fact as to whether actions taken by defendant caused adverse employment decisions to be made concerning the plaintiffs. . . ."3 Stiles now appeals again to this Court, solely on the qualified immunity issue.

We have jurisdiction over the appeal under 28 U.S.C. 1291; see Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151 (1995); Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985). We review a motion to dismiss based on the defense of qualified

immunity de novo as it involves a pure question of law. Acierno v. Cloutier, 40 F.3d 597, 609 (3d Cir. 1994) (citing Burns v. County of Cambria, 971 F.2d 1015, 1020 (3d Cir. 1992)).

The District Court based this conclusion on deposition testimony regarding a meeting that took place between Stiles and Fisher in August, 1998. The meeting apparently involved the results of an investigation being conducted by Stiles' office regarding allegations of improper conduct by Plaintiffs in their investigatory duties. At this meeting, Stiles informed Fisher that he would not prosecute any cases investigated by Plaintiffs. Additionally, Fisher and Stiles discussed the possibility of an"FBI/US Attorney operation" leasing space in the same Philadelphia office building (the "Essington Avenue" Office) that housed Pennsylvania's Bureau of Narcotics Investigation ("BNI"). According to Fisher's deposition, Stiles said that the United States Attorney's Office and the FBI would "continue[ ] to have problems" dealing with "BNI at Essington Avenue so long as any of the [plaintiffs] continue to be housed at Essington Avenue." Reacting to this statement by Stiles, Fisher wrote a note that read: "Personnel Problems--FBI/U.S. Atty Assignment," accompanied by the words, "need them [Plaintiffs] out of Essington." Fisher further stated in his deposition that Stiles promised to provide witnesses against Plaintiffs if they filed a grievance following their reassignment. Fisher also indicated that the Attorney General's Office would "check out" Philadelphia Police Department employees with the FBI before they moved into Essington Avenue.

The contours of the doctrine of "qualified immunity" are well-delineated and its underlying rationale has been clearly pronounced. As the Supreme Court explained, "permitting damages suits against government officials can entail substantial social costs,

including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034,3038 (1987). Courts have accommodated this concern"by generally providing government officials performing discretionary functions with a `qualified immunity,' shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Id.; see Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986).

"One of the purposes of [qualified] immunity . . . is to spare a defendant not only unwarranted liability, but u warranted demands customarily imposed upon those defending a long drawn out lawsuit." Siegert v. Gilley, 500U.S. 226, 237, 111 S.Ct. 1789, 1793 (1991). Doctrinally speaking, qualified immunity "is an immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985) (emphasis in original); see Siegert, 500 U.S. at 226, 111 S.Ct. at 1794. As the Supreme Court has explained, "qualified immunity" affords "protection to all but the plainly incompetent or those who knowingly violate the law." Malley, 475 U.S. at 341, 106 S.Ct. at 1096. The rule supports "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." In Re City of Philadelphia Litig., 49 F.3d 945, 960 (3d Cir. 1995) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 2732 (1982) (citations omitted)).

In order to defeat an assertion of qualified immunity, a plaintiff must allege that the official violated a"clearly established" right. Anderson, 483 U.S. at 635, 107 S.Ct. at 3038. A plaintiff does

not fulfill this requirement simply by alleging the defendant violated some constitutional provision. Rather, "the right the official is alleged to have violated must have been `clearly established' in a more particularized, and hence more relevant, sense." Anderson, 483 U.S. at 640, 107 S.Ct. at 3039 (emphasis added). As this Court explained, "clearly established rights" are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates that right. A plaintiff need not show that the very action in question has previously been held unlawful, but needs to show that in light of preexisting law the unlawfulness was apparent. Shea v. Smith, 966 F.2d 127, 130 (3d Cir. 1992) (citations omitted).

In determining whether an official violated a clearly established right, the Court first must ask whether a plaintiff has asserted a violation of a constitutional right at all, D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1368 (3d Cir. 1992) (citing Siegert, 111 S.Ct. at 1793), and, if so, then go on to examine whether the right was "clearly established." Id. This Court has interpreted the phrase "clearly established" to mean "some but not precise factual correspondence" between relevant precedents and the conduct at issue, and that "[a]lthough officials need not predic[t] the future course of constitutional law, they are required to relate established law to analogous factual settings." Ryan v. Burlington County, 860 F.2d 1199, 1208-09 (3d Cir. 1988), cert. denied, 490 U.S. 1020, 109 S.Ct. 1745 (1989) (quoting People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 144 (3d Cir. 1984)). The essential inquiry is whether a reasonable official in the defendant's position at the relevant time "could have believed, in light of clearly established law, that [his or her] conduct comported with established legal standards." Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 797 (3d Cir. 2000) (quoting Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989), cert. denied, 493 U.S. 1044, 110 S.Ct. 840 (1990)).

Stiles argues that he is entitled to "qualified immunity" on all three counts in Plaintiffs' Amended Complaint. More specifically, Stiles asserts that the District Court erred by not following the requisite analytical framework for assessing a "qualified immunity" claim and that--had the District Court performed the correct analysis--the Court would have had to grant the motion to dismiss. Along these lines, Stiles asserts that Plaintiffs have not alleged violations of any federal rights and, therefore, could not prove violations of any "clearly established" rights. Defendant posits that Plaintiffs have, at best, alleged violations of "garden variety" state employment law claims.

Plaintiffs' appellate Brief offers no substantive response to the "qualified immunity" arguments raised by Stiles. Rather, Plaintiffs' theory of the case, as explained in their Brief, is that "[t]his appeal is no more than a re-submission of the same issues that were before the Court previously [in McLaughlin I]." Plaintiffs' Brief at 6 ("Summary of Argument"). As such, Plaintiffs label Stiles' appeal a "poorly disguised misnamed motion to vacate and reconsider." Id. Plaintiffs' apparent contention is that this Court already conclusively decided the issue of qualified immunity against Stiles in McLaughlin I.

We reject Plaintiffs' contention that the qualified immunity issue was already decided by this Court in McLaughlin I. A careful reading of that case reveals that the panel decided only that Stiles was not necessarily entitled to absolute immunity on all claims. The Court did not address the completely distinct doctrine of qualified immunity. See id. at 3-4.

Furthermore, we agree with Defendant that the District Court erred in summarily dispensing with the qualified immunity issue in favor of Plaintiffs. As discussed above, the analytical framework that a court must use in addressing a "qualified

immunity" argument is well-settled in this Circuit. The court cannot--as the District Court essentially did here--stop with a conclusory statement that Stiles' alleged use of "influence with plaintiffs' employer" violated the first amendment. Rather, the District Court must go one step further and determine whether the facts alleged by plaintiffs violated a "clearly established right." This necessarily entails an analysis of case law existing at the time of the defendant's alleged improper conduct. Without such an analysis there is no way to determine if the defendant should have known that what he or she was doing was constitutionally prohibited. See In Re City of Philadelphia Litg., 49 F.3d at 961 (if the law is not established clearly when an official acts, he is entitled to qualified immunity because he "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to `know' that the law forbade conduct not previously identified as unlawful.") (quoting Harlow, 457 U.S. at 819, 102 S.Ct. at 2738). In other words, there must be sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited. Although the District Court seemed to be aware of the appropriate test, see App. at 6 n.1, it did not adequately apply the test to this case.

We see no need to remand the case. Even assuming as true Plaintiffs' allegations, we cannot say that Stiles--at the time he acted--violated any "clearly established" constitutional right. Notably, Plaintiffs' Brief fails to mention even one case in this Circuit or elsewhere to suggest that Stiles violated a "clearly established" right.4 In fact, as explained above, Plaintiffs did not substantively respond at all in their Brief to Stiles' arguments regarding qualified immunity. Rather, Plaintiffs' Brief argued a different theory of the case altogether--that the qualified immunity issue had already been decided by this Court in McLaughlin I. As noted above, however, that reading of our prior opinion is incorrect.

Moreover, our own review of the law existing at the time of Stiles' alleged conduct reveals that he had no reason to think that his alleged interaction with the Pennsylvania Attorney General violated Plaintiffs' "clearly established"

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4. Plaintiffs fared no better in their Brief to the District Court in response to Defendant's Motion to Dismiss or in the alternative for Summary Judgment. In the Motion to Dismiss, Stiles clearly asserted a "qualified immunity" defense. App. at 258. In responding to that Motion, Plaintiffs cited no case law--in existence at the time of Stiles' alleged conduct--to suggest violation of a "clearly established" right. See App. at 362-363. The District Court--although it refused to grant Stiles qualified immunity--also did not analyze the factual allegations against case law Precedent.

Constitutional rights. In Count I of the Amended Complaint, Plaintiffs allege that Stiles acted administratively to influence the Pennsylvania Attorney General to take adverse employment-related action against them. Although the Amended Complaint does not identify the specific source of any right Stiles may have violated, the District Court apparently construed Count I as a first amendment based retaliation claim. Nevertheless, even if we assume that Count I alleges a constitutional right, it does not demonstrate violation of one that is "clearly established."

When a public official is sued for allegedly causing a third party to take some type of adverse action against plaintiff's speech, we have held that defendant's conduct must be of a particularly virulent character. It is not enough that defendant speaks critically of plaintiff or even that defendant directly urges or influences the third party to take adverse action. Rather, defendant must "threaten" or "coerce" the third party to act. Along these lines Stiles' Brief aptly directs us to our sister circuit's opinion in Suarez Corp. Indus. v.

McGraw, 202 F.3d 676 (4th Cir. 2000):

> The nature of the [defendant's] retaliatory acts has particular significance where the public official's acts are in the form of speech. Not only is there an interest in having public officials fulfill their duties, a public official's own First Amendment speech rights are implicated. Thus, where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation, intimating that punishment, sanction, or adverse regulatory action will follow, such speech does not adversely affect a citizen's First Amendment rights even if defamatory. Id. at 687.

At the time Stiles committed the alleged violations, the Third Circuit had already held that strongly urging or influencing, but not "coercing" a third party to take adverse action affecting a plaintiff's speech did not violate plaintiff's constitutional rights. R.C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85 (3d Cir. 1984). In R.C. Maxwell, Plaintiff Maxwell leased space from Citibank in the Borough of New Hope for the right to maintain commercial billboards. The Borough Council felt that the billboards negatively affected the town's "ambience" and wrote a strong letter to Citibank, urging it to have the billboards removed when plaintiff's lease expired. In that letter, the Borough expressly stated that it would be seeking legal remedies--such as drafting a zoning ordinance or dragging Citibank into litigation--if the billboards were not removed. Id. at 86-87. Citibank complied with the Borough's request, noting that its desire to stay in the Borough Council's "good graces" was a motivating factor in deciding not to allow Maxwell to maintain the billboards after expiration of the lease. Id. at 87.

Maxwell refused to remove the billboards and brought an action against the Borough for, among other causes of action, violation of its first amendment rights. In addition to damages, Maxwell sought a declaration that the Borough acted unlawfully in "coercing" Citibank to take action against it. Id. The District Court granted summary judgment in favor of the Borough and ordered it to remove the billboards within 15 days. Id. This Court affirmed. In addressing the first amendment claim, we explained that the Borough's actions did not amount to the type of serious "coercion" that would trigger a constitutional violation. Id. at 88-89. Moreover, the fact that Citibank acted in part because it wished to have a "receptive climate" within the Borough for future development projects did not alter our conclusion. Id. at 89.

While not taking place specifically in the employment context, we believe that our Opinion in R.C. Maxwell--written well before Stiles' alleged interaction with the Pennsylvania Attorney General--provides relevant legal principles to guide us in this case. Stiles had no reason to believe that requesting or influencing another's employer to take adverse personnel action violated first amendment rights. We note in this regard that the alleged improper conduct itself took the form of speech--conversations with Fisher where Stiles allegedly influenced Fisher to take adverse action against Plaintiffs. Cf. X-Men Security, Inc. v. Pataki, 196 F.3d 56, 68-70 (2d Cir. 1999) (noting that public official's own right to free speech must also be Considered and that such rights are not necessarily subordinate to plaintiffs' free speech rights); Smith v. School District of Philadelphia, 112 F. Supp.2d 417, 431 (E.D. Pa. 2000) (school district's urging Home and School Association to remove plaintiff from his position as president of that association was itself a "protected right to free speech"); Northeast Women's Center, Inc. v. McMonagle, 670 F. Supp. 1300, 1308 (E.D. Pa. 1987) ("[a]ttempts to persuade another to action are clearly within the scope of the First Amendment").5

For the foregoing reasons we will reverse the order of the District Court entered on July 7, 2000, and remand with instructions to dismiss all claims against Stiles.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. MCLAUGHLIN,	)	
CHARLES MICEWSKI,	)	
DENNIS MCKEEFERY	)	**CIVIL ACTION NO.**
	)	
Plaintiffs	)	**1:CV-97-1555**
	)	
VS	)	
ALEX WATSON ET AL	)	**(JUDGE CAPUTO)**
	)	
Defendants	)	

MEMORANDUM

Before the Court is Defendant's (Michael Stiles) Motion to Dismiss or In the Alternative for Summary Judgment (doc. 50). The motion concerns the Amended Complaint filed by the plaintiffs (doc. 45). The defendants motion to dismiss is based upon the failure of the plaintiff to state a claim for relief based upon administrative action by defendant which resulted in adverse employment actions against them. The motion for summary judgment is based upon the contention that the defendant took no administrative action against the defendants.

Because I find that the amended complaint does state a claim upon which relief can be granted, the motion to dismiss will be denied. Further, because I find there is a genuine issue of material fact as to whether actions taken by defendant caused

adverse employment decisions to be made concerning the plaintiffs, the motion for summary Judgment will be denied.

1. Standard of Review - Pad. R. Civ. P. 12(b)(6).

Federal Rule of Civil Procedure 12(b)(9) states that a motion to dismiss may be granted for failure to state a claim upon which relief can be grantee. Fed. R. Civ. P. l2(b)(6). For the purposes of the motion to dismiss, the court takes as true all well-pleaded allegations In plainitffs complaint and construes all reasonable inferences in the pleader's favor. Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113 (3d Cir. 1998), The burden fa on the moving party to prove that no claim exists. See In re Corestates Trust Fee Litigation, 837 F.Supp. 104 (E.D. Pa. 1993J, affirmed, 39 F.3d. 81 (3d Cir. 1994), A complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory on which he intends to proceed. Bowers v. Hardwick, 478 U.S. 168, 202, 106 S.Ct. 2841, 2849, 92 L,Ed,2d 140 (1986). The court has a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Id. A complaint should only be dismissed for failure to state a claim rf it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957).

ll. Standard of Review - Fed.R.Civ.P. 56.

Federal Rule of Civil Procedure 56 provides that the moving party is entitled to summary Judgment rf "the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ, P. 56. A fact is "material" if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 248, 106 S Ct, 2505, 2510 (1986). "Facts that could after the outcome are material facts." Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 197 (3d Cir, 1994), cert. denied, 115 S.Ct. 580 (1994). "Summary Judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248,108 S.Ct. at 2510. Initially, the moving party must show the absence of a genuine Issue concerning any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 329, 106 S Ct. 2548, 2554 (1986). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party, White v. Westinghouse Elec. Co., 882 F.2d 56, 59 (3d Cir. 1988); Continental Ins. Co. v Bodie, 682 F.2d 436 (3d Cir. 1982). Once the moving party has satisfied its burden, the nonmoving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. at 256- 57,106 S. Ct. at 2514. Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for summary judgment once the moving party ha presented evidentiary materials. School v. First Fidelity Bancorporation, 812 F.2d 654, 657 (3d Cir. 1990). Rule 56 requires the entry of summary judgment, after adequate time for discovery, where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552. "The moving party is 'entitled to a judgement as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she as the burden of proof." Id. at 323.

III. Discussion

A. Motion to Dismiss

It is important to note that the Court of Appeals for the Third Circuit found that the plaintiff's "appear to have sufficiently alleged an administrative action claim against Stiles." McLaughlin v. Watson, No. 99-3087, slip op. at 5 (3d Cir. Sept, 21, 1999). That administrative claim is based upon plaintiff's allegations that defendant used his influence with the Pennsylvania ATTORNEY General to secure adverse employment decisions by the Pennsylvania ATTORNEY General, their employer, against them. The Court of Appeals has noted that this qualified as administrative action which is outside the prosecutorial function and therefore not subject to prosecutorial immunity. Id. at 4, Carter v. City of Philadelphia, 199 WL 250771 (1999). While the defendant contends the plaintiffs do not allege any administrative action on part of the defendant, I conclude that the Court of Appeals recognizes that the allegations of the defendant's use of influence with plaintiff's employer resulting in adverse employment decisions constitute an actionable claim based on administrative action.

Defendant contends he is entitled to qualified immunity. I find it premature to determine this issue in defendant's favor. There is a first amendment claim asserted against defendant. That is a clearly established constitutional right, which, if interfered with plaintiff's employer, would nullify the availability of qualified immunity. Wilson v. Layne 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

Therefore, the motion to dismiss will be denied.

B. Motion far Summary Judgment

Defendant Stiles moves for summary Judgment as to plaintiffs' claim that he took administrative action to punish plaintiffs for their continued investigation into the alleged Dominican drug conspiracy, (Motion, Doc. 50.) In his motion,' Stiles argues that he "did not [take], nor could he have taken, administrative action against plaintiffs' and. therefore, is entitled to Judgment as a matter of law. (Brief in Support of Motion. Doc. 53 at 21.) Plaintiffs respond that Stiles. acting on behalf of the U.S. Attorneys Office and the Federal Bureau of Investigation (FBI"), told Pennsylvania ATTORNEY General Michael Fisher ("Fisher") that plaintiffs "had to get out of Philadelphia." (Brief in Opposition to Motion for Summary Judgment. Doc. 58 at 14.)

A prosecutor is entitled to immunity from a civil suit for damages "in initiating a prosecution and in presenting the government's case." Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct, 984. 998,47 L6d.2d 128 (1976). This prosecutorial immunity extends to the actions taken in a prosecutor's role as advocate for the government. Id at 430,431. The duties of a prosecutor in his role as advocate involve preliminary actions, "including questions of whether to present a case to a grand jury,... whether and when to prosecute,... which witnesses to call, and what other evidence to present". Id, fn.33.

A prosecutor is not entitled to immunity for actions taken in an administrative, or "policy making" capacity. Carter 181 F.3d at 350 (citing Walkers v. City of New York. 974 F.2d 293 (2d cir. 1982)). Administrative functions include day-to-day managerial decisions, such as the hiring, supervision and discipline of personnel. Id. ("[Officials may be state officials when they prosecute crimes,. .but serve as... policy makers when they manage

or administer their own offices.') A prosecutor acting in an administrative capacity, however, may still be entitled to qualified immunity from liability. id, (quoting Giuffre v. Bissell. 31 F.3d 1241, 1251 (3d Cir. 1994)).

In the present case, Stiles states that he met with Fisher in August, 1998 to report the results of an investigation of plaintiffs but denies instructing Fisher to remove plaintiff from the Philadelphia office of the Bureau of Narcotics Investigation, located on Essington Avenue ("BNI"-Essington"):

Q. At some point did you tell the attorney General that you did not want these agents in Philadelphia?

A. No.

(Dep. of Stiles. Doc. 58', Exhibit E at 6&-61.) Rather, Stiles expressed his discomfort with a proposed move of an FBI/US attorney operation" into offices occupied by BNI agents including plaintiff McKeefery:

A. And my recollection is when the attorney General raised the" question about FBI [High Intensity Drug Trafficking Agency] group using space at Essington Avenue... [a]nd I said I did not know- if we would move down there with any of these agents still on site.

Q. You didn't now If you would-

A. Would rent that apace with any of those agents still on site.

Q. You didn't say no. I won't? You said, would? I mean, was there a question?

A. Well, what- the way I believe we left it was I would go back and talk to the FBI about that. There were reservations...which I shared about moving...an FBI operation down there when there were people there accusing the FBI and the [U.S.] aTTORNEY Office of not conducting law enforcement but protecting Dominican drug dealers.

(Dep. of Stiles. Doc. 58. Exhibit E at 03-64.) In addition, Stiles informed Fisher that the U.S. ATTORNEY's Office would not prosecute cases investigated by plainitffs:

A. We do not anticipate that there will be any indictments. There are four FBI agents whose cases we don't want, that we cannot take We cannot do business with BNl Essington Avenue with these officers doing cases in our office and - and I gave him four names.

Q. And those four names were McLaughlin, Micewski, McKeefery and Eggles?

A. Well, those four names actually were McLaughlin,. McKeefery, Micewski, and Mellor.

(Dep, of Stiles, Doc, 58, Exhibit E at 81.)

Finally, Stiles states that the FBI relocated to the Essington Avenue office despite the continued presence of McKeefery and, therefore plaintiffs' contention that he ordered the removal oft he BNI agents is unfounded. (Dep. of Stiles, Doc. 54 at 67).

The excerpts from stiles' deposition indicate that he did not take administrative action to cause the reassignment of plaintiffs. (See Dep. of Stiles. Doc. 58, Exhibit E at 60-84). Therefore, the evidence presented by Stiles is sufficient to show the absence of material facts regarding his alleged effort to move plaintiffs from BNI Essington. Since Stiles has satisfied his burden, plaintiff's must present affirmative evidence to defeat defendants properly supported motion fro summary judgment. See Anderson v. Liberty Lobby Inc, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

Plaintiffs respond that "Mr. Fisher recollected Mr. Stiles telling him (during the August, 1998 meeting) that he was speaking for the FBI, and himself, and the plaintiffs had to get out of Philadelphia". (Brief in Opposition to Defendants Motion for Summary Judgment, Doc, 58 at 14). The relevant portion of Fisher's deposition states as follows:

A. In other words, we were 1 testified earlier, that we asked Mr. Stiles at that point well, assuming that the investigation would to be closed and no action would be taken, you know, what's your reaction to it or what's your position in dealing with out agency at Essington Avenue?

And (Stiles) said he can not only speak for himself but for the FBI, that they continued to have problems in dealing with BNI at Essington Avenue so long as any of the plaintiffs continue to be housed at Essington Avenue.

(Dep. of Fisher, Doc. 58. Exhibit C at 103.) Fisher states further that he noted Stiles' opposition to plaintiffs continued presence at BNI. Essington during the meeting:

Q. And that's where you have the notation near the margin here, need them out of Essington, right?

A. Right.

Id at 103. Fisher's handwritten notes of the meeting, under a section entitled "Personnel Problems - FBI/US Atty Assignment", include the names "McLaughlin, McKeefery, Milliar (and) Micewski accompanied by the words, "need them out of Essington". (Notes of Meeting, Doc 58, Exhibit C1) In addition,m the notes also contain a statement that "OAG" will check out Philadelhpia PD employees with FBI before they move into Essington..." Id.

Fisher and Stiles also discussed the potential contractual implications of reassigning McLaughlin, McKeefery and Micewski. (Dep. of Fisher, Doc 58, Exhibit c at 109). In his deposition, Fisher states:

> A. We said to Mr. Stiles that, you know, you've taken this position about these employees and somewhat to his surprise I said, we have a union contract here and, you know, we - have to abide by the provisions of the union contract.

> And .... I said, there could come a time that . . . we're going to have some information to back up our position. (Dep. of Fisher.. Doc. 58, Exhibit E at 111).

In response to Fisher's concern, Stiles offered "to supply witnesses... to testify as to why we took certain actions" if the agents filed a grievance following their reassignment. (Id. at 112).

Fisher's testimony and notes regarding his August, 1998 meeting with Stiles provide evidence that Stiles took administrative action to cause the removal of the plaintiffs form the Essington office. (See Dep. of Fisher, Doc. 58, Exhibit E at 103, 109-111). While Fisher states only that Stiles "continued to have problems" with the proposal to share office space with plaintiffs, this statement, when taken in conjunction with Fisher's handwritten meeting note, "need them out of Essington" indicates that Stiles contributed to the decision to reassign plaintiffs. (See Id). Additionally, Fisher's testimony that the Office of the Attorney General would "check out Phil[adelphia] PD employees with FBI before they move into Essington... " suggest that Stiles possessed decision making power with respect to personnel at Essignton. (Notes of Meeting, Doc. 58, Exhibit C1). Moreover, Stiles' assurance to Fisher that he "would supply witnesses . . . to testify as to why we took certain [personnel] actions" in the event of labor arbitration further reveals his participation in the decision to reassign plaintiffs (emphasis added). (See Dep. of Fisher, Doc. 58, Exhibit E at 112).

Finally, while Stiles correctly states that McKeefery remained at Essington following the move by the FBI,. Fisher's testimony indicates that he did so despite Stiles' 'preference" to remove him. (See Dep. of Fisher, Doc, 58, Exhibit E at 104.) Also. even if Stiles did not contribute to the decision to remove McKeefery, evidence remains that he did so with respect to McLaughlin and Micewski. (See Id.at 103,109-111.)

The parties dispute facts necessary to determine whether Stiles took administrative action to remove plaintiff from BNI-Essington to punish them for investigating the alleged Dominican drug conspiracy. Accordingly. Defendant summary judgement motion for summary Judgment with respect to this issue will be denied.

An appropriate order will follow.

Date: July 6, 2000

A. Richard Caputo
United States District Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3087

JOHN MCLAUGHLIN; CHARLES A. MICEWSKI; DENNIS J. MCKEEFERY; EDDIE EGGLES,
Appellants
v.
ALEX WATSON, Assistant Secretary of State for the U.S. State Department; DAVE LAWRENCE; LARRY LEIGHTLEY; VICTORIA NAYLOR; MICHAEL STILES; Detective SILVANA; Detective WOODS; ARNOLD GORDON; TOM CORBETT; JOHN KELLY; MICHAEL B. FISHER; RICHARD PATTON; LOU GENTILE; FIQUITO VASQUES, PENA-GOMEZ; PEDRO CORPORAN

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 97-CV-01555)
District Judge: Honorable A. Richard Caputo

Submitted under Third Circuit LAR 34.1(a)
September 13, 1999

MANSMANN, MCKEE, and STAPLETON, Circuit Judges
(Filed September 21, 1999)

OPINION OF THE COURT

MANSMANN, Circuit Judge.

APPENDIX "C"

Before us is an appeal from the District Court's grant of Defendants' Rule 12 (b)(6) Motions to Dismiss actions by Plaintiff-Appellants (three former and one retired agent of the Bureau of Narcotics Investigation of the Pennsylvania Office of attorney General (the "Agents") against (1) the U.S. attorney for the Eastern District of Pennsylvania ("Stiles") and (2) the Pennsylvania attorney General and three employees of that office (the "PAG Defendants"). The Agents allege that to protect a Dominican Republic drug organization with ties to a Dominican Republic political party supported by the CIA and State Department, the Defendants impeded the Agents' investigation into organization's dealers target primarily low-income Africian-American and Hispanic inner city residents and that ht profits garnered from addicting and supplying these individuals further allege that when they objected to the PAG Defendant's refusals to prosecute the cases prepared by the Agents against organization members, Defendants undertook to discredit the Agents publicly, and to destroy their law enforcement career.[12]The District Court granted Stiles' motion that the complaint

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[12] Although officials of the State Department and the CIA, Dominican nationals, and the former Pennsylvania attorney General were also named as defendants, they were never served with process. A City of Philadelphia prosecutor was served but voluntarily dismissed by Plaintiffs.

be dismissed for failure to comport with the "short and plain statement" pleading requirements of Rule 8 of the Federal Rules of civil Procedure. It further determined to dismiss the Complaint without leave to amend because Stiles was entitled to absolute prosecutorial immunity as to the only discernible claim against him" - his failure to prosecute the Agents cases. The District Court also granted the PAG defendants' motion to dismiss for failure to state injunctive relief under the Pennsylvania constitution are barred by Eleventh Amendment immunity.

Because we find that the District Court erred in dismissing the Complaint without leave to amend, we will remand for further proceedings consistent with this opinion.

I.

The District Court premised its decision to dismiss the claims against Stiles without leave to amend on the belief that Stiles was clearly entitled to absolute prosecutorial immunity for the sole claim of failure to prosecute the Agents' cases. We note, however that although the Complaint is hardly a model of clarity, the Agents also alleged that Stiles used his influence to obtain adverse personnel actions against them. See e.g. District Court's November 25, 1998 Memorandum at 6 (noting that the Agents asserted that Stiles conspired with the PAG Defendants to make "politically inspired administrative decisions to shut plaintiffs up and punish them for improper reasons"); Brief of Appellees at 5 (listing adverse

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2 As the District Court explains, the Complaint alleges First and fifth Amendment and §1981 violations by Stiles (Counts I, II, and III); and §1981 and §1983 and Pennsylvania constitutional violations by the PAG Defendants (Counts IV through VII). See November 25, 1998 Memorandum at 1-2.

actions taken against the Agents "on the representations of Stiles). As we made clear in Carter v. City of Philadelphia, 1999 WL 250771 (Apr. 28, 1999), prosecutorial immunity is restricted to prosecutorial - as distinguished from administrative - functions. Administrative decisions, including those regarding the employment or supervision of personnel outside the prosecutor's office, are not subject to absolute prosecutorial immunity. Because Stiles was not clearly entitled to prosecutorial immunity from all of the claims against them, the analysis for whether the Agents state a cause of action against Stiles should proceed along the same lines as for the PAG Defendants.

II.

The District Court was correct in its holding that the Agents failed to state a substantive due process claim under §1983 as they do not have due process rights to employment. The Court was also correct in its determination that as Caucasians not alleging discrimination due to their own race, the Agents cannot state a cause of action under 1981. The Agents do not cite any support for the proposition that under these circumstances they may rely on the race of the people they are attempting to protect and assist. finally, the District Court properly held that the Ex-parte Young exception to Eleventh Amendment immunity in cases seeking only prospective injunctive relief does not apply where the underlying right is one of state, rather than federal law. See Pennhurst v. Halderman, 465 U.S. 89 (1984).

Nonetheless, although the Complaint is poorly drafted, it may be read to state a claim under the First Amendment. The PAG Defendants have not merely, as the District Court suggests, forbade the Agents from airing their policy disputes in public. Rather, the Agents allege that these Defendants have systematically published defamatory material and forbade the Agents to rebut it. We are not prepared to say as a matter of law that no conditions along these

lines can ever violate the First Amendment.[3]

The Agents appear to have sufficiently alleged an administrative action claim against Stiles and a First Amendment-based §1983 claim against the PAG Defendants, however, even if the present allegations are insufficient to convey notice of these theories, amendment of the Complaint is warranted where, as here, it is not certain that such amendment would be fruitless.

III.

For the aforegoing reasons, we will reverse and remand the dismissal without leave to amend and instruct the District Court to permit amendment of the Complaint.

TO THE CLERK:

Please file the foregoing opinion.

_____
Circuit Judge

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3 In addition, although the 14th Amendment may afford substantive protection against unfair treatment in public employment under the privileges or immunities clause, cf. Saenz v. Roe,___U.S.___, 119 S.Ct. 1518 (May 1999), the Agents have not raised this argument.